SHEPPARD MULLIN RICHTER & HAMPTON LLP
A Limited Liability Partnership
Including Professional Corporations
JAMES J. MITTERMILLER, Cal. Bar No. 85177
JOHN C. DINEEN, Cal. Bar No. 222095
501 West Broadway, 19th Floor
San Diego, California 92101-3598
Telephone: 619-338-6500
Facsimile: 619-234-3815

Attorneys for Defendants
SPRINT PCS ASSETS, L.L.C. and SPRINT PCS LICENSE, L.L.C.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| JAMES M. KINDER,<br><br>Plaintiff,<br><br>v.<br><br>SPRINT PCS ASSETS, L.L.C., SPRINT PCS LICENSE, L.L.C. and DOES 1 through 100, inclusive,<br><br>Defendants. | Case No. 07 CV 2049 WQH (JMA)<br><br>**ANSWER BY DEFENDANTS SPRINT PCS ASSETS, L.L.C. AND SPRINT PCS LICENSE, L.L.C. TO COMPLAINT**<br><br>[Complaint Filed: September 11, 2007] |

Defendants Sprint PCS Assets, L.L.C. and Sprint PCS License, L.L.C. (collectively "Defendants") answer Plaintiff James M. Kinder's Complaint as follows:

1. Defendants admit the allegations of paragraph 1.

2. Defendants admit that Defendants are both Delaware limited liability companies and are qualified to do business in California. Except as so admitted, Defendants deny the allegations of paragraph 2.

3. Defendants lack sufficient information or belief to answer the allegations of paragraph 3 and on that ground deny each and every allegation of that paragraph.

4. Defendants lack sufficient information or belief to answer the allegations of paragraph 4 and on that ground deny each and every allegation of that paragraph.

**ANSWER TO FIRST CAUSE OF ACTION**

5. Defendants refer to their answer to paragraphs 1 through 4 and incorporate those answers by reference in answer to paragraph 5.

6. Defendants lack sufficient information or belief to answer the allegations of paragraph 6 and on that ground deny each and every allegation of that paragraph.

7. Defendants admit that Subdivision (b)(1)(A)(iii) of Section 227 of Title 47 of the United States Code provides: "It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States – (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . .(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call." Except as so admitted, Defendants deny the allegations of paragraph 7.

8. Defendants lack sufficient information or belief to answer the allegations of paragraph 8 and on that ground deny each and every allegation of that paragraph.

9. Defendants admit that Subdivision (b)(1) of Section 64.1200 of Title 47 of the Code of Federal Regulations provides: "All artificial or prerecorded telephone messages shall: (1) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated . . . ." Except as so admitted, Defendants deny the allegations of paragraph 9.

10. Defendants lack sufficient information or belief to answer the allegations of paragraph 10 and on that ground deny each and every allegation of that paragraph, and specifically deny that any messages were illegal.

11. Defendants admit that Subdivision (b)(2) of Section 64.1200 of Title 47 of the Code of Federal Regulations provides: " All artificial or prerecorded telephone messages shall: (2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. For Telemarketing messages to residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign." Except as so admitted, Defendants deny the allegations of paragraph 11.

12. Defendants lack sufficient information or belief to answer the allegations of paragraph 12 and on that ground deny each and every allegation of that paragraph, and specifically deny any messages failed to comply with statutory requirements.

13. Defendants admit that Subdivision (b)(3) of Section 227 of Title 47 of the United States Code provides: "A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State - (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation, (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or (C) both such actions. If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph." Except as so admitted, Defendants deny the allegations of paragraph 13.

## AFFIRMATIVE DEFENSES

Defendants, on information and belief, assert the following affirmative defenses:

### FIRST AFFIRMATIVE DEFENSE
### (Failure to State a Claim)

1. The Complaint fails to state any claim upon which relief may be granted.

**SECOND AFFIRMATIVE DEFENSE**
**(Estoppel)**

2. Plaintiff is estopped by reason of his own conduct, acts or omissions, to recover on any claims that he may have had against Defendants.

**THIRD AFFIRMATIVE DEFENSE**
**(Waiver)**

3. Plaintiff's claims are barred, in whole or in part, by the doctrine of waiver.

**FOURTH AFFIRMATIVE DEFENSE**
**(Failure to Mitigate)**

4. Plaintiff had a duty to take reasonable steps to mitigate and/or avoid his alleged damages. Defendant is informed and believes, and thereon alleges, that Plaintiff failed to take any steps or delayed unreasonably in doing so. Had Plaintiff timely and diligently taken reasonable steps to mitigate and/or avoid his alleged damages, such alleged damages, if any, would have been reduced or avoided altogether. By reasons of the foregoing, Plaintiff is barred in whole or in part from recovering damages in this case.

**FIFTH AFFIRMATIVE DEFENSE**
**(Unclean Hands)**

5. Plaintiff comes into this Court with unclean hands, and under the circumstances of this case, such doctrine bars or limits any recovery against Defendants.

**SIXTH AFFIRMATIVE DEFENSE**
**(Statute of Limitations)**

6. The claims as alleged in the Complaint against Defendants are barred by the applicable statute of limitations.

**SEVENTH AFFIRMATIVE DEFENSE**
**(Comparative Negligence)**

7. Plaintiff, by his own actions and conduct, has failed to exercise reasonable care and diligence on his own behalf, thereby causing or contributing to his alleged injury and damages, if any. Plaintiff's recovery therefore must be reduced or eliminated altogether by the proportion of damages caused by his own acts and conduct.

**EIGHTH AFFIRMATIVE DEFENSE**
**(Laches)**

8. Plaintiff, by his acts and conduct, is barred from recovery under the doctrine of laches.

**NINTH AFFIRMATIVE DEFENSE**
**(Assumption of Risk)**

9. Plaintiff knowingly, intentionally, and voluntarily assumed the risk of the conduct, events and matters alleged in the Complaint and the damages, if any, incurred by Plaintiff, are the direct and proximate result of the risk so assumed.

**TENTH AFFIRMATIVE DEFENSE**
**(Collateral Estoppel)**

10. Plaintiff's complaint is barred under the doctrine of collateral estoppel. The issues presented in Plaintiff's complaint are identical to issues presented in Plaintiff's prior litigation in this Court.

**ELEVENTH AFFIRMATIVE DEFENSE**
**(Consent)**

11. Plaintiff's claims are barred, in whole or in part, because plaintiff consented to all conduct surrounding the occurrences alleged in the complaint.

**TWELFTH AFFIRMATIVE DEFENSE**
**(Ratification)**

12. Plaintiff's claims are barred, in whole or in part, because Plaintiff ratified all conduct surrounding the occurrences alleged in the complaint.

**THIRTEENTH AFFIRMATIVE DEFENSE**
**(Procedural and Substantive Due Process Rights)**

13. To the extent that Plaintiff's complaint seeks exemplary or statutory penalties of any kind, it violates Defendants' rights to procedural and substantive due process under the United States Constitution, Fifth and Fourteenth Amendments, and therefore fails to state a claim upon which punitive or exemplary damages or statutory damages may be awarded.

**FOURTEENTH AFFIRMATIVE DEFENSE**
**(Excessive Fines)**

14. To the extent that Plaintiff's complaint seeks statutory penalties of any kind, it violates the prohibition against "excessive fines" of the United States Constitution, Eighth Amendment, and therefore fails to state a claim upon which statutory penalties may be awarded.

**FIFTEENTH AFFIRMATIVE DEFENSE**
**(Constitutionality)**

15. The TCPA, under which Plaintiff's claims are made, is invalid on its face or as applied to Defendants on the facts of this action, pursuant to Article I, Section 10, Article IV, Section 2 and the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, and Article I, Sections 7, 9, 15 and 17 and Article IV, Section 16 of the California Constitution.

**SIXTEENTH AFFIRMATIVE DEFENSE**
**(Compliance with Statute)**

16. Defendants' compliance with the statutes, rules and regulations which govern the subject matter of this lawsuit precludes their liability to Plaintiff.

**SEVENTEENTH AFFIRMATIVE DEFENSE**
**(No Injury)**

17. The conduct alleged by Plaintiff did not injure, harm or damage Plaintiff.

**EIGHTEENTH AFFIRMATIVE DEFENSE**
**(Invalid Assignment)**

18. Rights and causes of action arising under the Telephone Consumer Protection Act of 1991 ("TCPA") are not assignable. Any proposed or putative assignment of such rights and causes of action to Plaintiff are therefore invalid, and Plaintiff lacks standing to sue or recover thereon.

**NINETEENTH AFFIRMATIVE DEFENSE**
**(Technical Violations Not Enforceable)**

19. Violations of the technical requirements of the TCPA are not enforceable by private litigants, and Plaintiff lacks standing to sue or recover based thereon.

**TWENTIETH AFFIRMATIVE DEFENSE**
**(Uncharged Calls Exempt)**

20. On information and belief, the alleged telephone calls received by Plaintiff, if any, were not charged to him, exempting them from application of the TCPA.

**TWENTY-FIRST AFFIRMATIVE DEFENSE**
**(Bad Faith)**

21. On information and belief, this lawsuit was filed in bad faith and/or for objectively frivolous reasons, thereby barring Plaintiff from recovering on any cause of action in the Complaint, and entitling Defendants to recover their costs of suit incurred herein, including reasonable attorneys' fees.

**TWENTY-SECOND AFFIRMATIVE DEFENSE**
**(Acquiescence)**

22. On information and belief, the Complaint and its alleged causes of action, and each of them, are barred because Plaintiff acquiesced to any conduct engaged in by Defendants.

**TWENTY-THIRD AFFIRMATIVE DEFENSE**
**(Plaintiff's Contributory Fault)**

23. Plaintiff failed to exercise ordinary care, caution or prudence in his own welfare or to avoid the occurrence of the conduct alleged in the Complaint. By his failure to do so, Plaintiff thereby contributed to the happening of such losses or damage, if any. Accordingly, any recovery by Plaintiff against Defendants must be reduced in proportion to the amount of negligence on the part of Plaintiff.

**TWENTY-FOURTH AFFIRMATIVE DEFENSE**
**(Unjust Enrichment)**

24. On information and belief, the Complaint and its alleged cause of action are barred because the relief sought by Plaintiff would, if granted, unjustly enrich Plaintiff.

**TWENTY-FIFTH AFFIRMATIVE DEFENSE**
**(Justification and Privilege)**

25. The actions of Defendants, respecting the subject matters alleged in the Complaint, were undertaken in good faith, with the absence of malicious intent to injure Plaintiff, and constitute, lawful, proper and justified means to further the sole purpose of engaging in and continuing its business. By reason thereof, Plaintiff is barred, in whole or in part, from recovery on the Complaint.

**TWENTY-SIXTH AFFIRMATIVE DEFENSE**
**(Acts of Third Parties - Causation)**

26. Plaintiff's damages, if any, were caused solely, directly and proximately by the acts or omissions of third parties, not by any acts or omissions by Defendants, their agents or employees. These other persons are solely responsible for any damages caused thereby.

**TWENTY-SEVENTH AFFIRMATIVE DEFENSE**
**(Acts of Third Parties - Apportionment)**

27. The acts and/or omissions of independent third parties contributed to the damages complained of in the Complaint, if any there be. Defendants are entitled to a judicial determination of fault of those third parties and to a reduction of damages, if any, awarded to Plaintiff in proportion to fault.

**TWENTY-EIGHTH AFFIRMATIVE DEFENSE**
**(Unstated Additional Defenses)**

28. Defendants presently have insufficient knowledge or information upon which to form a belief as to whether they may have additional, as yet unstated, affirmative defenses available. Defendants reserve their right to assert additional affirmative defenses in the event that discovery indicates they would be appropriate.

**WHEREFORE, DEFENDANTS PRAY FOR JUDGMENT AS FOLLOWS:**

1. That Plaintiff take nothing by his Complaint;

2. That Defendants be awarded all of their costs, including attorneys' fees incurred herein; and

3. That the Court award such other and further relief as it deems just and proper.

Dated: November 2, 2007

SHEPPARD MULLIN RICHTER & HAMPTON LLP

By s/ John C. Dineen

JAMES J. MITTERMILLER
JOHN C. DINEEN

Attorney for Defendants
SPRINT PCS ASSETS, L.L.C. and SPRINT PCS LICENSE, L.L.C.

Email: jdineen@sheppardmullin.com